

Federal Communications Commission

DA 97-2232

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments,)

FM Broadcast Stations.)

(Ashdown and DeQueen, Arkansas))

MM Docket No. 97-223
RM-9014

NOTICE OF PROPOSED RULE MAKING

Adopted: October 15, 1997

Released: October 24, 1997

Comment Date: December 15, 1997

Reply Comment Date: December 30, 1997

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Bunyard Partnership, licensee of Station KARQ(FM), Channel 221A. Ashdown, Arkansas, and Jay W. Bunyard and Anne W. Bunyard, licensee of Station KDQN-FM, Channel 226C2, DeQueen, Arkansas ("petitioner").¹ Petitioner requests the substitution of Channel 227C3 for Channel 221A at Ashdown and modification of the license for Station KARQ(FM) accordingly. To accommodate the upgrade, petitioner requests the substitution of Channel 221C2 for Channel 226C2 at DeQueen and modification of the license of Station KDQN-FM to specify operation on Channel 221C2. Petitioner stated an intention to apply for Channel 227C3 at Ashdown and Channel 221C1 at DeQueen, Arkansas, if allotted and upon authorization of a construction permit for Stations KARQ(FM) and KDQN-FM, to build the facilities promptly.

2. In support of the proposal petitioner states that its proposal constitutes an incompatible channel swap as Channel 227C3 cannot be used at Ashdown while Channel 226C2 is operating in DeQueen, nor can Channel 221C2 be utilized in DeQueen while Channel 221A is operating in Ashdown. Therefore, petitioner asserts that as there are no other alternate channels available for either the upgrade at Ashdown or the substitution at DeQueen, the proposal creates a mutually-exclusive relationship as contemplated by Section 1.420(g)(3) of the Commission's Rules, and therefore is exempt from the consideration of competing proposals. *See Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels*, 60 RR 2d 114, 120 (1986).

3. In further support of the proposal, petitioner states that adoption of its proposal at DeQueen would cause the proposed 1.0 mV/m contour of Channel 221C2 to overlap the Grade

¹Jay W. Bunyard and Anne W. Bunyard are principals in Bunyard Partnership.

B (47 dBu) contour of Station KTAL-TV, Channel 6, Texarkana, Texas. Therefore, in accordance with the requirements set forth in the *First Report and Order* in MM Docket No. 86-144, 52 FR 8259, March 17, 1987, petitioner provided an engineering study to demonstrate the impact of the requested channel substitution of Channel 221C2 at DeQueen on the availability of new noncommercial service on Channels 218, 219 and 220. According to petitioner's engineering exhibit, all classes of stations on Channel 218 are now precluded by the protection radius to Station KTXK (Channel 218A), Texarkana, Texas, Station KALR (Channel 218C3), Hot Springs, Arkansas, and Station KARG (Channel 219C2), Poteau, Oklahoma. As to Channel 219A, petitioner states that a preclusion area lies within the proposed Channel 221C2 contour at DeQueen, as well as those of Stations KTXK, KALR and KARG. Petitioner identifies one town within the identified preclusion area, Nashville, Arkansas (population 4,639). However, petitioner asserts that a slight site restriction on Channel 219A would remedy a shortspacing to requested Channel 221C2 at DeQueen. Petitioner adds that the increased protection contours for higher class stations on Channel 219 from Stations KARG, KTXK and KALR are the precluding factor for Channels 219C3, 219C2, 219C1 and 219C. With respect to Channel 220A, petitioner's engineering statement indicates that one affected town, Glenwood, Arkansas (pop. 1,354), lies within the potential preclusion area. Petitioner suggests that an alternate Class A noncommercial facility, if available, could provide service to that community. As to Channel 220C, Channel 220C1 and Channel 220C2, petitioner advises that they are precluded by the protection radius of other existing stations or proposed noncommercial facilities and not by proposed Channel 221C2 at DeQueen. In the Channel 220C3 preclusion area petitioner reports there are no communities exceeding 1,000 persons. Based on its study, petitioner asserts that the allotment of Channel 221C2 at DeQueen will not adversely affect area noncommercial educational service.

4. Petitioner claims that the allotment of Channel 227C3 to Ashdown will enable KARQ(FM) to increase its population and service area to encompass 124,736 persons in an area of 4,791.1 square kilometers, representing an increase of 110,214 persons and 3,107.0 square kilometers.

5. As petitioner is aware, the Commission has expressed its concern that higher powered operation on Channel 221 not adversely affect the continued availability of noncommercial educational service in TV Channel 6 markets. In such markets, the existence of a TV Channel 6 station effectively restricts the use of the lower portion of the noncommercial educational band, as could upgrades on Channel 221 on the use of the higher portion of the spectrum. Therefore, it is necessary to determine the preclusive effect of this proposal. According to a staff engineering analysis of the proposal, although petitioner has supplied some preclusion information, the study is incomplete. Specifically, while petitioner provided maps and analyses to demonstrate that any preclusion which would occur as a result of its proposal to allot Channel 221C2 at DeQueen, Arkansas, may be remedied on some channels and classes, petitioner did not provide maps for others. These are Channel 218, Classes C3, C2, C1, and C; Channel 219, Classes C2, C1 and C; and Channel 220, Classes C1 and C. Although the petitioner claims that preclusion on those channels will be eliminated by the increased impact of area stations operating on higher class channels, that does not account for the increased preclusion caused to the channels under consideration. The increased arcs of preclusion are the result of the increase in

the required separation distances between existing stations in the area of investigation and each NCE-FM adjacent and co-channels of all the appropriate classes. Where a certain area is precluded from use by NCE-FM stations of a given class, it does not follow necessarily that use of channels as a higher class would always be precluded. Some areas may not be affected. Consequently, we require that maps depicting the preclusive effect, or lack thereof, be provided for all affected NCE-FM channels of all classes. In this instance, in order to complete the preclusion studies for the requested substitution of Channel 221C2 at DeQueen, petitioner should provide with its comments preclusion maps for Channels 218, 219 and 220 of all classes of channels, as indicated *supra*, rather than just those provided with its proposal.

6. Channel 227C3 can be substituted for Channel 221A at Ashdown, Arkansas, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioners' specified site for Station KARQ(FM), located 5.0 kilometers west of the community at coordinates 33-40-22 and 94-11-02. Channel 221C2 can be substituted for Channel 226C2 at DeQueen, Arkansas, at the presently authorized site of Station KDQN-FM at coordinates 34-13-35 and 94-17-35.

7. In light of the above, we shall propose to substitute Channel 227C3 for Channel 221A at Ashdown, Arkansas, and modify the license for Station KARQ(FM) to specify operation on the higher class channel, in accordance with Section 1.420(g)(3) of the Commission's Rules. We shall also propose to substitute Channel 221C2 for Channel 226C2 at DeQueen, Arkansas, and modify the license for Station KDQN(FM) accordingly. As this proposal constitutes an incompatible channel swap, we will not accept competing expressions of interest in Channel 227C3 at Ashdown.

8. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Ashdown, Arkansas	221A, 280A	227C3, 280A
DeQueen, Arkansas	226C2	221C2

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before December 15, 1997, and reply comments on or before December 30, 1997, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission,

Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.